

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL ALLEN KETIH,

Defendant and Appellant.

H043814

(San Benito County

Super. Ct. No. CR1501075)

ORDER MODIFYING OPINION  
AND DENYING PETITION FOR  
REHEARING  
[NO CHANGE IN JUDGMENT]

BY THE COURT:

It is ordered that the opinion filed on March 14, 2019, be modified as follows:

On page 3, footnote 5, delete the last sentence and replace it with the following sentences:

Keith referred to the thermite as “plastic thermite.” Because Keith’s thermite ignited quickly when the police sought to dispose of it, prosecution expert James Allen opined that “[s]omething had been done to [the thermite] to sensitize it,” making it “much more sensitive to ignition than normal.”

There is no change in the judgment. The petition for rehearing is denied.

Dated: \_\_\_\_\_

\_\_\_\_\_  
DANNER, J.

\_\_\_\_\_  
GREENWOOD, P.J.

\_\_\_\_\_  
GROVER, J.

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A jury convicted defendant Michael Allen Keith of crimes related to his possession of explosives and hazardous materials at his home in Hollister. Keith contends on appeal that we must reverse two of his convictions for insufficient evidence; the unanimity instruction given for one of the counts was inadequate; one of the crimes is unconstitutionally vague; and the trial court erred when it concluded that it could not sentence him to a term of mandatory supervision. For reasons that we will explain, we reject Keith's claims and affirm the judgment.

**I. FACTS AND PROCEDURAL BACKGROUND**

*A. Procedural Background*

The San Benito County District Attorney charged Keith with four counts: felony unlawful possession of an explosive (black powder and smokeless powder) (Health & Saf. Code, § 12305; count 1); felony reckless possession of an explosive at his home

(Pen. Code, § 18715, subd. (a)(3); count 2);<sup>1</sup> misdemeanor failure to obtain a hazardous materials storage permit (Hollister Mun. Code, § 8.20.040, subd. (A); count 3); and misdemeanor failure to safely store a regulated material (dimethyl sulfate and benzyl chloride) (Hollister Mun. Code, § 8.20.040, subd. (B); count 4).<sup>2</sup>

During his jury trial, Keith pleaded no contest to count 3. The jury found Keith guilty of counts 2 and 4.<sup>3</sup>

The trial court sentenced Keith on count 2 to four years in the county jail pursuant to section 1170, subdivision (h), and 180 days on counts 3 and 4, to be served concurrently with each other and with the sentence on count 2. The trial court denied probation and ruled that it did not have the authority to order mandatory supervision because that would entail suspending part of Keith's sentence.

Keith timely appealed the judgment.

*B. The Evidence Presented at Trial*

1. The Prosecution Evidence

In September 2014, Keith called 911 to report that he had just interrupted a burglary in progress at his house in Hollister.<sup>4</sup> Hollister Police Department Patrol Officer Rudolf Rodriguez responded to the call, spoke to Keith, and entered the house to ensure that no intruders remained inside. The home was in disarray, cluttered with boxes and other items. Rodriguez saw a box labeled "explosives" and, on a shelf leading into the kitchen, he saw a can labeled "black powder," "danger," "extremely flammable and explosive." Inside the kitchen, Rodriguez discovered large, heavy machinery. In a

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<sup>1</sup> Unspecified statutory references are to the Penal Code.

<sup>2</sup> Keith was originally charged by complaint. He waived his right to a preliminary hearing, and the complaint was deemed the information.

<sup>3</sup> Count 1 was treated as a lesser included offense of count 2. The trial court dismissed count 1 after the jury verdict on count 2.

<sup>4</sup> Another burglary had recently occurred at Keith's home.

bathroom, Rodriguez saw a box labeled “hydrochloric acid.” In a bedroom, Rodriguez found three containers, one of which was labeled “dimethyl sulfate.”

In Keith’s garage, Rodriguez saw a work table with a cylindrical object on it, a “military-grade mortar launcher,” ammunition cans, and thermite, which he believed to be a military explosive.<sup>5</sup> On the front porch, Rodriguez saw a wooden table with a metal top and metal shavings on and around the table. Keith told Rodriguez that he owned a business called M.K. Ballistics.<sup>6</sup>

Keith’s house was located in a residential neighborhood in which the houses were close together. Concerned by what he had observed, Rodriguez contacted his sergeant. The sergeant arrived, toured the house, and ordered Rodriguez to evacuate the neighbors. The Hollister Fire Department, a hazardous materials team, and the Monterey County bomb squad were dispatched to Keith’s residence.

Monterey County Sheriff’s Department public safety bomb technician Deputy Nicholas Kennedy and other bomb technicians searched Keith’s house for potentially dangerous items and brought them outside to the front yard. Keith assisted Kennedy with locating, identifying, and separating the potentially dangerous objects. Keith was cooperative but could not identify several items.

The bomb technicians discovered multiple containers of black powder and smokeless powder in Keith’s house, garage, and yard—totaling 11 pounds of black

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<sup>5</sup> Other prosecution witnesses explained that thermite is not an explosive, but a very energetic material that burns at a high temperature and cannot be extinguished with a fire extinguisher. Thermite’s ignition point is high—at least 2000 degrees fahrenheit—and thermite will not ignite when touched with a match. The thermite found at Keith’s residence weighed 17.1 pounds. Keith referred to the thermite as “plastic thermite,” because he added a binder to it, which made the thermite easier to ignite.

<sup>6</sup> M.K. Ballistics manufactured less-than-lethal ammunition and projectiles for law enforcement and correctional agencies.

powder and 114 pounds of smokeless powder.<sup>7</sup> The containers were labeled with several warnings, including the extreme flammability of the powder, keeping the containers away from heat, open flames and sparks, and avoiding impacts and friction. The technicians also discovered flares, containers of various ammunition in different stages of manufacture, blasting caps, thermite, electrically fired 50-caliber “enhanced tip” incendiary ammunition, oxidizers,<sup>8</sup> corrosives and other chemicals, unidentified powders in canisters in different stages of decomposition, grenade tops with connected fusing mechanisms, and various metals.<sup>9</sup> In a bedroom, Kennedy found an open can of black powder, but he could not independently recall if the can contained any powder. A bathroom contained various materials and lab equipment. These items and chemical-stain burns suggested the bathroom had been used for mixing chemicals.

Deputy Kennedy testified as an expert on explosives. He explained that both black powder and smokeless powder are heat sensitive—meaning a blasting cap is not necessary to detonate the powder. These powders can be set off by heat, shock, friction, or electrostatic discharge. Kennedy conducted a “spark test” on samples of Keith’s black powder and smokeless powder and found the powders to be energetic explosives.

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<sup>7</sup> These weight figures included the containers. The net weight of the smokeless powder was 89 pounds.

<sup>8</sup> Deputy Kennedy testified that oxidizers are “a chemical form of oxygen” and “the main ingredient in any type of explosives.” He explained that oxidizers can be added to a fuel to cause or promote the combustion of the fuel.

<sup>9</sup> An inventory taken of the chemicals found in Keith’s home listed 1 liter of dimethyl sulfate; 1 liter of benzyl chloride; a gallon box of hydrochloric acid; 2 one-pound boxes of boron nitride powder; a five-gallon bucket of “K, Cl, O”; a one-quart container of lead peroxide; 1 quart of an unknown solid; 2 half-pound containers of iron oxide; 16 ounces of antimony sulfide; a container of black copper oxide; 1200 grams of potassium nitrate; 1 pound of potassium carbonate; 3 five-pound containers of potassium chlorate; 1 pound of ammonium chloride; 3 containers of silver iodide, in quantities of 1, 3, and 4 pounds; 1 gallon of nitric acid; 1 gallon of hydrochloric acid; 1 pound of sulfur; 1 pound of lactose, 500 grams red phosphorous amorphous; a 32-ounce jar of magnesium shavings; and 100 grams of mercury.

When exposed to a flame, both samples erupted violently and quickly consumed themselves.<sup>10</sup> Black powder and smokeless powder deflagrate—meaning that they burn fast—and both powders can explode when contained. Kennedy testified that an individual could not lawfully possess more than five pounds of black powder and 20 pounds of smokeless powder at this residence.<sup>11</sup>

Kennedy observed electronic devices plugged into electrical outlets throughout Keith's house. The devices caused Kennedy concern because electricity generates heat, and a small source of heat or flame in the house could have caused a flammable chain reaction that would have consumed the house. Kennedy noted the piles of paper and other flammable material in the house. Kennedy saw several heat sources in the house, including a plug-in wall heater, an electric stove with material on top of the coils, wall sockets, and a metal grinder on the front porch that produced heat and sparks that could start a fire. Kennedy testified that the friction generated by walking across a floor also can generate heat and small ignition sources.

Kennedy opined that, “all things equal or without human intervention,” black powder and smokeless powder are safe materials because they do not self-ignite. However, in Kennedy's opinion, the condition of Keith's house could not be described as “all things equal or without human intervention,” because the “entire residence was touched by the hands of man. It was evident in every room. Stuff was piled everywhere.” Because items in the house were situated precariously and there was little room to move about, Kennedy believed “human intervention” that would cause an accidental fire or ignition was “inevitable.” In response to a hypothetical, Kennedy

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<sup>10</sup> Subsequent laboratory analysis confirmed that the sampled material was black powder and smokeless powder.

<sup>11</sup> Although Kennedy's testimony did not mention the source of law of this restriction, he was apparently referring to the limits set out in Health and Safety Code section 12001, subdivision (f)(1).

opined that storage of black and smokeless powder in a manner similar to the way the materials appeared at Keith's house was reckless, because the powders were scattered throughout and the "totality of the circumstances" created a dangerous situation.

Kennedy discovered a container of dimethyl sulfate in a bedroom. The container was "teetering" on top of another container, situated above ammunition canisters containing unknown substances and near flammable items. Captain Benjamin Majeleuski of the Salinas Fire Department and Monterey County Hazardous Material Response Team explained that dimethyl sulfate is extremely toxic and posed a danger to anyone nearby not wearing protective gear. Dimethyl sulfate is combustible and can cause injury or death at very low levels—measured at seven parts per million—if it contacts exposed skin or the lungs. Keith stored the dimethyl sulfate in his house in a container within an aging, rusted, and corroded outer canister. Keith kept the dimethyl sulfate in cramped quarters next to many other stacked items, which put the chemical at risk of falling, spilling, and mixing with other nearby materials.

The technicians also found a container of benzyl chloride beneath the dimethyl sulfate. Benzyl chloride is an extremely dangerous, toxic, and flammable substance. The condition of the outer canister holding the benzyl chloride was worse than that of the dimethyl sulfate; it had more corrosion and appeared slightly damaged and was obviously older.

Majeleuski testified that the overall condition of the house caused him great concern, but he was particularly concerned about one of the bathrooms. He observed that acid and other materials were stored close to drains leading to water treatment facilities; reactions between the materials was possible; the sink showed signs of chemical mixing; and the materials in the bathroom were in disarray. Majeleuski also explained that the dimethyl sulfate was particularly worrisome because, based on its location, "merely walking in the doorway, you have the potential of knocking that package over." In addition, Majeleuski believed that the damage and rust indicated a potential weakness in

the container holding the dimethyl sulfate, and that a liquid had spilled in the container and was “eating through the inside of it.”

James Allen, a retired supervising arson bomb investigator with the California State Fire Marshal, testified as an expert in energetic materials (i.e., explosives). Based on his review of photographs and reports, Allen opined that Keith’s house was very dangerous due to the lack of organization of the materials in the house and the house’s cluttered condition, which made it likely that first responders might knock something over as they moved throughout the residence. For instance, black powder stored in an open container could be knocked over and scattered. Allen testified that an arc created by flipping a light switch could cause black powder to ignite, but on cross examination he admitted that such ignition could happen only if black powder grains were inside the light switch itself. He also explained that static electricity caused by moving one’s feet across a carpet could ignite any black powder scattered on the carpet.

Allen opined that the large quantity of smokeless powder in Keith’s house and the method of storage of at least one of the containers of smokeless powder endangered emergency responders through the risk of premature ignition of the powder and the lack of protection against the effects of fire. Allen explained that black powder and smokeless powder should be stored away from sparks, friction, shock, and fire—events that would cause premature or unexpected ignition. Further, black and smokeless powder should be stored in proper containers within magazines, which are the legal storage containers for explosives under federal law.<sup>12</sup> Allen only observed one magazine—a “Type 2” magazine designed for temporary storage—in the photographs taken of Keith’s residence. Allen testified that unscrewing the metal lid of a metal can containing black powder—

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<sup>12</sup> A “magazine” is a metal-covered, wooden-lined box with an appropriate locking mechanism, which is kept away from combustible material.

which was a common receptacle for black powder—can itself create friction, ignite the powder, and cause the can to explode.

Allen opined that the hazardous materials and explosives at Keith's residence could not have been kept safely separated, because "the amount of the precursors and in the form of the items used in the manufactur[ing] of explosives and pyrotechnics, the quantities far exceed anything that could be legally stored even in a Type 1 [large storage] magazine all by itself because you have too many different items that do not store together." In other words, the residence was unsafe, in Allen's opinion, because Keith had stored excessive quantities of fuels and oxidizers together, which created risks associated with premature ignition.

Asked hypothetically whether, if Keith had been cutting metal canisters close to debris his conduct would have posed a danger of premature ignition, Allen opined that it would have because Keith's work area appeared to have a large quantity of unknown white powder on it. Allen said that Keith's backyard posed a danger to emergency responders because of the "tremendous amount of clutter," the inability to distinguish dangerous items, and the risk of knocking something over that could cause premature ignition.

Allen opined that, if a fire involving the thermite had occurred at Keith's residence, given the hazardous materials, clutter, and debris, the fire department would have had to set up a perimeter and let the house burn to the ground. Allen believed that three houses nearby would have been at risk of burning, because the fire department could not have safely extinguished a fire at Keith's house.

Allen opined that hydrochloric acid in Keith's home would have endangered emergency responders, because the acid is a very strong oxidizer that can cause premature ignition. Similarly, potassium chlorate would have posed a danger, because it is also a very strong oxidizer and, when mixed with other fuels, it burns violently and can interact with acids to cause ignition in some cases. Allen opined that, if magnesium

shavings were at Keith's residence, they endangered responders, because magnesium is a violently burning metal that creates an explosive release of hydrogen gas if it encounters water.

Given all of the chemicals that were identified in the reports and photographs that Allen observed, Allen concluded that Keith's home was a dangerous place. Allen explained, "the vast amount of combustible materials, the precursor chemicals, both in fuel and oxidizer form, the amount of powder, both black and smokeless, and all of the other items, the flares, the military items that were there, it was a hazardous place to even walk through. And if it were to become involved in a fire, [it] very easily could have ended up being a very serious event."

## 2. The Defense Evidence

Keith himself was the sole defense witness, and the defense did not offer any evidence other than Keith's testimony. Keith testified as a lay witness and as an expert on the handling and storage of black powder, smokeless powder, potassium chlorate, thermite, and sulfuric acid. Keith detailed his training and experience with explosives in the United States Army and the National Guard, his experience teaching classes on explosives, and his other work and training with certain explosives and chemicals.

Keith testified that, during the two days preceding his 911 call about the burglary, he had delivered to his home a couple of cans and a paper bag containing black powder, and most of the smokeless powder the technicians removed from his residence.<sup>13</sup> Keith brought the powder to his residence from his business, M.K. Ballistics, which he had owned for over two decades. Keith oversaw safety procedures for the black powder and smokeless powder at his business, which was regularly inspected by various regulators.

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<sup>13</sup> Keith explained that he had previously had some smokeless powder in a canister at his home, before he brought the rest there. He had been using that smokeless powder for his "personal reloading" of ammunition.

He had never had an explosives accident. M.K. Ballistics had occupied three buildings, totaling 17,300 square feet, on eight acres and had “about eleven explosive magazines and multiple storage and production cells.” Keith brought the powder, about 50 firearms, and other items from M.K. Ballistics to his home, because his business had been evicted from its leased property, and Keith planned to move the business to Nevada. When Keith’s home was burglarized five days before his 911 call, the burglars stole 10 guns.

At his home, Keith placed the black powder into a black wooden box on the exterior of the house and some of the smokeless powder into a “day” or “Type 2” magazine. Keith also put smokeless powder in a wooden box in the hallway. “[O]ther materials were distributed into cabinets to separate [them]. We had some in the—under the bathroom sink. I had some in the hall cabinet, and a couple pounds in a cardboard box.” In addition, Keith put a container of black powder on a shelf and two containers of black powder in a file cabinet in the garage to separate them from the other materials. Keith stored seven pounds of black powder outside his house and four pounds inside.

Keith denied that he used the powder at his home for ammunition-loading operations and asserted he “was making the inert components” for his business. Keith said he was using his bathroom as a “sorting area,” and he denied dumping chemicals down the drain or mixing chemicals in his home. Keith testified that he did not think his method of storage was reckless, because he intended to store the materials for only a short time—just a couple of days—and he believed he was following relevant recommendations and regulations on the storage and transport of explosives. Keith was packing some of the material at the house for imminent transport to Nevada, and he had reserved a rental truck for the morning after the burglary occurred. Other than Keith’s testimony, the defense did not provide any corroboration of Keith’s plan to move to Nevada or the date the materials had been moved from Keith’s business to his house.

Although he had never poured hydrochloric acid on black powder, Keith said he did not think a reaction would occur between the materials if they encountered each

other, “other than a wetting of the material . . . [and] oxidation of the carbon with the hydrochloric acid.” He did not believe a fire would result from mixing hydrochloric acid and black powder. He testified that, if his 50-caliber ammunition were exposed to flames, the bullet would “just pull out . . . pop out [and] the [cartridge] case would fly to the rear,” because the bullet was only “loosely crimped” in the cartridge case—suggesting that the bullet would not fire with much force.

Keith explained that the metal shavings found on the table on his porch were aluminum chips created when he cut cartridge cases with a saw to fulfill an order for the Federal Bureau of Prisons. He claimed he cut the cartridge cases before he brought the black powder and smokeless powder to his home. He did not believe his cutting created any hazard or danger whatsoever, because “there’s no spark, no nothing. You’re not going to have any [possibility] of propagation, transfer, et cetera.” Keith denied operating any machinery at his home while the black powder and smokeless powder were stored there.

On cross-examination, Keith testified that he stored his powders in a magazine at his business. Keith said that federal regulations permitted possession and transport of 50 pounds of black powder “without a license.” Keith claimed not to know about “regulations on residential storage of explosives” until he was told of them by the bomb squad technicians. Keith said that he properly stored the 89 pounds of smokeless powder at his home because the powder was placed in “separations [sic], in cabinets, et cetera; and it was there for a—to be there for a short duration.” Keith conceded that the smokeless powder found in a pouch was not properly stored when the police arrived. Keith also testified that it was “not good practice” to store hydrochloric acid above smokeless powder. Keith opined that an extensive amount of friction would be required to ignite smokeless powder, and that black powder did not ignite from friction in military tests. He conceded black powder granules in a carpet might ignite from friction caused

by walking. But he said there were no black powder granules in his carpet and an open black powder canister depicted in a video of his house was empty.

Keith opined that “[t]here’s no real potential” for ignition of the black powder in his garage despite the presence of a water heater, because the water heater was several feet from the black powder—which was stored in a cabinet as recommended by the retailer—and “[i]t takes 800 degrees to cause black powder to ignite.” As with the smokeless powder, Keith believed he had sufficiently separated and safely stored the black powder at his house because he intended to keep the powder there only for a couple of days.

## **II. DISCUSSION**

Keith raises five claims on appeal. Keith argues the evidence was insufficient to support convictions for reckless possession of an explosive (count 2) and for failing to keep and store a regulated material in such manner as to protect the health, safety, and welfare of the general public (count 4). In addition, Keith contends that the unanimity instruction for count 2 was inadequate, Hollister Municipal Code section 8.20.630, subdivision (C) (the charge alleged in count 4) is unconstitutionally vague, and the trial court erred when it ruled that it could not sentence Keith to a term of mandatory supervision under section 1170, subdivision (h)(5) for his conviction on count 2. For the reasons stated below, we reject Keith’s claims.

### *A. Sufficiency of the Evidence For Counts 2 and 4*

“[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be . . . to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” (*Jackson v. Virginia* (1979) 443 U.S. 307, 318.) “When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact

could find the defendant guilty beyond a reasonable doubt.” (*People v. Powell* (2018) 5 Cal.5th 921, 944, internal quotation marks omitted.) A reviewing court “presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.” (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) “An appellate court may not substitute its judgment for that of the jury. If the circumstances reasonably justify the jury’s findings, the reviewing court may not reverse the judgment merely because it believes that the circumstances might also support a contrary finding.” (*People v. Ceja* (1993) 4 Cal.4th 1134, 1139 (*Ceja*).)

1. Count 2 - Reckless Possession of an Explosive

Keith claims that the evidence was insufficient to conclude that he acted recklessly when he possessed the black powder and smokeless powder at his residence.<sup>14</sup> Specifically, Keith argues that a reasonable factfinder could not conclude that he was “actually aware of a substantial risk to the public, that he ignored that risk, and that the risk was so substantial that his behavior was grossly outside the norm.”

Black powder and smokeless powder are classified by statute as explosives. (§ 16510, subd. (a).) Section 18715, subdivision (a), states in relevant part: “Every person who recklessly or maliciously has in possession any destructive device or any explosive in any of the following places is guilty of a felony: . . . [¶] (3) In or near any private habitation.” The jury was instructed that a “person acts recklessly when (1) he is aware that his actions present a substantial and unjustifiable risk, (2) he ignores that risk, and (3) the person’s behavior is grossly different from what a reasonable person would have done in the same situation.” (CALCRIM No. 2572; see also *People v. Heideman* (1976) 58 Cal.App.3d 321, 334.)

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<sup>14</sup> In her closing argument, the prosecutor told the jury that the People were seeking a conviction only on a theory of reckless possession of an explosive, adding “[w]e’re going to take maliciously off the table.”

Keith focuses his argument on the lack of evidence of any “real danger” that the black powder and smokeless powder or any other material in Keith’s home would ignite and cause a fire. He asserts that the prosecution’s witnesses proffered several theories about how the powders could ignite, but none of the theories demonstrated “a substantial risk that a fire would start because of Keith’s possession of gunpowder” or that “any of the gunpowder was stored in such a way that it was at substantial risk of igniting.” Keith claims that there was no evidence that he actually manufactured explosives, mixed materials, or possessed military-grade munitions at his home. He also asserts that he separated the powder canisters and placed most of them in enclosed spaces according to the recommendations of nongovernmental bodies and certain regulations. He argues that his actions do not demonstrate that he subjectively believed his storage presented a substantial risk to public safety, because he called 911 to report a burglary, invited the responding officer into his home, and freely told the responders what materials he had at his residence.

We disagree with Keith’s contentions and, based on the entire trial record, we conclude that the evidence constituted legally sufficient proof of his guilt. The definition of acting recklessly “encompasses both subjective and objective elements. The subjective element is the defendant’s conscious disregard of risks known to him or her. But recklessness is not determined merely by reference to a defendant’s subjective feeling that he or she is engaging in risky activities. Rather, recklessness is also determined by an objective standard, namely what a law-abiding person would observe in the actor’s situation.” (*People v. Clark* (2016) 63 Cal.4th 522, 617 (*Clark*), internal quotation marks omitted [quoting Model Penal Code, § 2.02, subd. (2)(c)].) Although “any effort by [a] defendant to minimize the risks . . . could possibly be sufficient to rebut a conclusion of [the] defendant’s subjective awareness of engaging in [risky] activities[,] . . . it is the jury’s objective determination that ultimately determines recklessness. Therefore, it would be possible for the defendant to have engaged in

apparent efforts to minimize the risk . . . but still be determined by the jury to have been reckless, given all the circumstances known to defendant surrounding the crime.

Therefore we conclude that a defendant's good faith but unreasonable belief that he or she was not posing a risk to human life in pursuing the felony does not suffice to foreclose a determination of reckless [behavior]." (*Clark, supra*, at p. 622.)

Turning first to the evidence showing that Keith's possession of the powders at his house was objectively unreasonable, the jury heard that Keith possessed 11 pounds of black powder and 89 pounds of smokeless powder at his residence. These amounts were more than two times the legal limit for black powder and more than four times the legal limit for smokeless powder. Retired investigator Allen, who testified as an expert in explosives, opined that, although it is permissible to store black powder and smokeless powder up to the legal limit on a shelf in a home, large quantities of powder should be stored in proper containers within magazines.

The evidence elicited at trial revealed the objective hazards posed by Keith's storage methods. Allen opined that first responders were endangered because the amount of powder far exceeded safe limits, especially when stored in the cluttered and debris-filled environment found at Keith's residence. Keith only had one magazine designed for temporary storage at his house. He stored some of his powder in wooden boxes inside and outside his house, and he spread the powder throughout the structure. In addition, Keith stored some of his powder canisters near chemical oxidizers—including hydrochloric acid and potassium chlorate—which Allen said created risks associated with premature ignition.

Investigator Allen and Deputy Kennedy explained how sparks, friction, shock, and fire were events that would cause premature or unexpected ignition of Keith's black powder and smokeless powder. Kennedy described the various electrical devices in Keith's house that produced heat and sparks that could start a fire. Kennedy provided his expert opinion that Keith's storage of black and smokeless powder was reckless, because

the powders were scattered throughout his house and the “totality of the circumstances” created a dangerous situation. Allen also opined that, given the “the vast amount of combustible materials, the precursor chemicals, both in fuel and oxidizer form, the amount of powder, both black and smokeless, and all of the other items,” Keith’s house was a dangerous place, and if a fire started, it “very easily . . . could have ended up being a very serious event.”

We do not agree with Keith’s assertion that the prosecution’s evidence is legally insufficient because the “state relied on hypothetical possibilities rather than actual probabilities” of danger. As the Colorado Supreme Court has observed, “Some risks may be substantial even if they carry a low degree of probability because the magnitude of the harm is potentially great. . . . Conversely, a relatively high probability that a very minor harm will occur probably does not involve a ‘substantial’ risk. Thus, in order to determine whether a risk is substantial, the court must consider both the likelihood that harm will occur and the magnitude of potential harm.” (*People v. Hall* (Colo. 2000) 999 P.2d 207, 217–218 [considering what constitutes a “substantial and unjustifiable risk” of death]; accord *In re L.J.* (2013) 56 Cal.4th 766, 778 [adopting *People v. Hall* as a standard for assessing “substantial risk”].) Here, the prosecution’s experts described how a fire at Keith’s home, because of the powder, chemicals, and other material he stored there, and the method by which he stored them, would have been a particularly dangerous event that would have consumed Keith’s house and put neighboring homes at risk of burning down.

The prosecution’s witnesses also presented evidence that other activities in which Keith engaged at the house made possession of the powders especially dangerous. The jury heard evidence that Keith mixed chemicals in his bathroom, and he used machinery to manufacture ammunition components at his house. Although Keith denied these activities, the jury could have rejected his testimony and reasonably credited the prosecution’s evidence that Keith’s actions were ongoing, based on the location and

appearance of the materials and equipment at his residence. We do not reweigh the evidence or resolve conflicts in the testimony when determining its legal sufficiency. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) “[I]nstead, [this] court must draw [all] inferences in support of the verdict that can reasonably be deduced from the evidence.” (*People v. Culver* (1973) 10 Cal.3d 542, 548.)

We conclude that these facts constitute substantial evidence that Keith’s behavior was “grossly different from what a reasonable person would have done in the same situation” (CALCRIM No. 2572), satisfying the objective component of recklessness.

Keith’s argument that the evidence did not show his subjective awareness of a substantial and unjustifiable risk is similarly unavailing. Keith’s own testimony showed his subjective awareness of the risks posed by his storage methods. Keith conceded that a pouch of smokeless powder was not properly stored when the police arrived. Keith admitted that it was “not good practice” to store hydrochloric acid above smokeless powder. That Keith called the police about the burglary does not demonstrate a lack of subjective awareness of the dangers of the substances he stored at his house. The jury could equally have concluded that, before calling the police, Keith weighed the danger of discovery of the powders and chemicals versus the risk of theft—posed by multiple burglaries of the materials essential to his business (including dozens of guns)—and decided the benefits of preventing the latter outweighed the risk of the former.

In addition, Keith testified as an expert in the handling of explosives. Although he disputed that the legal limits on black powder and smokeless powder applied to him, he knew that not all the powder he stored at his home was stored in appropriate magazines. He had only one small, temporary storage magazine at his home—which was in a dense residential neighborhood—and had been burglarized previously. By contrast, Keith had approximately 11 magazines on eight acres at his former place of business, and he admitted to storing his powder in those magazines, demonstrating that he was aware of proper storage methods.

Keith's arguments on appeal amount to an attempt to reargue inferences that the jury necessarily rejected with its guilty verdict. Before we can set aside a judgment of conviction for insufficiency of the evidence, "it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support [the judgment of conviction]." (*People v. Rehmyer* (1993) 19 Cal.App.4th 1758, 1765.) Based on the entire trial record, we conclude that the evidence of the conditions at Keith's residence and the expert testimony about the risks associated with his possession of large amounts of black powder and smokeless powder in that environment amounted to substantial evidence from which a reasonable trier of fact could find Keith guilty on count 2 for recklessly possessing an explosive in or near a private habitation.

## 2. Count 4 - Failure to Safely Store a Regulated Material

Keith also contends that the evidence was insufficient for his conviction on count 4, because there was no evidence that the containers holding regulated materials (dimethyl sulfate and benzyl chloride) were in fact corroded such that there was a serious risk of spillage. In addition, he maintains there was no evidence that a spill or leak would have endangered the "general public," a term Keith contends excludes emergency responders.

Keith was convicted of a misdemeanor violation of Hollister Municipal Code section 8.20.040, subdivision (B), which states that "[a]ll such hazardous materials shall be contained in conformity with Sections 8.20.630 through 8.20.790 of this chapter."<sup>15</sup> In turn, section 8.20.630, subdivision (C), provides in relevant part: "All hazardous materials shall be stored in such a manner as to protect the health, safety and welfare of the general public, regardless as to the length of time such product is stored."

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<sup>15</sup> Any violation of Chapter 8 of the Hollister Municipal Code is a misdemeanor. (Hollister Mun. Code, § 8.20.930.)

The trial court instructed the jury that dimethyl sulfate and benzyl chloride are hazardous materials under the California Code of Regulations.<sup>16</sup> In addition, the court instructed the jurors that they could not find Keith “guilty unless all of [them] agree that the People have proved beyond a reasonable doubt that the defendant stored at least one of the alleged items, [they] all agree on which alleged item(s) he stored, and [they] all agree that the manner in which the defendant stored the alleged item(s) failed to protect the health[,] safety, and welfare of the general public.”<sup>17</sup>

Keith had two one-liter containers of dimethyl sulfate and benzyl chloride in canisters stored in a bedroom, which was cramped and cluttered with many other stacked and flammable items.<sup>18</sup> Deputy Kennedy described the canister containing the dimethyl sulfate as “teetering” on top of another container, but he admitted on cross-examination

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<sup>16</sup> Keith does not make any claim of instructional error with respect to count 4.

<sup>17</sup> During deliberations, the jurors made three requests related to this instruction. They asked for the text of Hollister Municipal Code section 8.20.040, subdivision (B), and the Material Safety Data Sheet or manufacturer’s suggested storage methods for the two hazardous materials. The trial court responded by telling the jury that that the pertinent part of the code section was provided in the jury instruction, and neither the data sheet nor the manufacturer’s suggested storage methods were introduced as evidence, so they could not be provided.

The jury then asked, “What is the proper manner of storage of hazardous materials to protect the health, safety, and welfare of the general public according to Hollister Municipal Code section 8.20.040 (B)?” The trial court responded, “There was no testimony as to what the proper manner of storage of these materials . . . – what would constitute proper storage of these materials. There was no testimony of that.” The trial court then read the first sentence of section 8.20.630, subdivision (C), and said, “I guess, it comes down to a question of fact for you, the jury, to determine. [¶] Given the state of the evidence in this case, it’s up to you to determine whether or not these materials were stored in such a manner as to protect the health, safety and welfare of the general public. [¶] Okay. I’m sorry. That’s the best I can do.” Keith does not contend that the trial court erred in any of these responses. However, as discussed further below, he argues the jurors’ questions support his claim that this aspect of the Hollister Municipal Code is unconstitutionally vague.

<sup>18</sup> Neither party presented evidence about the condition of the internal receptacles containing the dimethyl sulfate and benzyl chloride.

that the canister was not moving. Kennedy did not “know what [the canister] would do if it were to fall, but [he] would want to prevent that.” Captain Majeleuski and investigator Allen explained that dimethyl sulfate is an extremely toxic substance that could cause injury or death if exposed to skin or a person’s lungs, even in small amounts. Majeleuski testified that he had concerns about the dimethyl sulfate based on the age of its outer canister and the rust and corrosion on the canister. He opined that the rust and corrosion indicated either that a liquid had spilled on the inside of the canister and was “eating through the inside of it,” or the canister had been stored for so long that it would not offer any protection should it get knocked over in its cluttered environment.

Captain Majeleuski also explained that benzyl chloride is an extremely dangerous, toxic, and flammable substance. He testified that the canister containing the benzyl chloride—which was found beneath the dimethyl sulfate—appeared slightly damaged and was even more corroded and older than the outer canister of the dimethyl sulfate. Majeleuski opined that these conditions indicated potential weakness in the canisters. Majeleuski also opined more generally about the safety concerns at Keith’s house resulting from the storage and mixing of various chemicals and materials in a very disordered environment.

We reject Keith’s argument that the prosecution was required to prove specifically that the containers of dimethyl sulfate and benzyl chloride “would have failed had they fallen and the chemicals spilled.” On its face, the Hollister Municipal Code required Keith to store his hazardous materials in a way that protected the health, safety, and welfare of the general public. (Hollister Mun. Code, § 8.20.630, subd. (C).) Although there was no testimony about the condition of the interior containers, based on the opinions of the prosecution’s experts and the circumstances at Keith’s residence, the jury could have reasonably concluded that Keith’s storage of the highly toxic dimethyl sulfate and benzyl chloride in deteriorating canisters in a cluttered bedroom and home containing explosives and many other chemicals did not amount to storage in “a manner as to protect

the health, safety and welfare of the general public.” We cannot reweigh the evidence presented and substitute our judgment merely because “the circumstances might also support a contrary finding.” (*Ceja, supra*, 4 Cal.4th at p. 1139.)

We also reject Keith’s argument that the evidence was legally insufficient because there was no evidence that Keith’s storage failed to protect the “general public.” Keith argues that the term “general public” in Hollister Municipal Code section 8.20.630, subdivision (C), should be read to require proof of risk to persons other than first responders. When reviewing the evidence for legal sufficiency, however, our task is limited. We only determine “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime.” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) We make this determination using the statutory language (see *People v. Delgado* (2013) 213 Cal.App.4th 660, 667), because “the plain language of our statute must control as to the acts which constitute the crime.” (*People v. Descheneau* (1921) 51 Cal.App. 437, 439, citing *People v. Barry* (1892) 94 Cal. 481.) We apply de novo review to the meaning of statutory language. (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

The jury was not given a definition of “general public.” “Because the statutory language is generally the most reliable indicator of [legislative] intent, we look first at the words themselves, giving them their usual and ordinary meaning.” (*People v. Ruiz* (2018) 4 Cal.5th 1100, 1105 (*Ruiz*), internal quotation marks omitted.) The Hollister Municipal Code does not define the term “general public.” In the absence of a statutory definition, we consult a standard dictionary definition. (See *People v. Castillolopez* (2016) 63 Cal.4th 322, 327–328 [referencing a dictionary to decide whether a knife blade was “locked into position” within the meaning of section 16470]; *People v. Forrest* (1967) 67 Cal.2d 478, 479–481 [citing a dictionary and encyclopedia to decide if a knife was covered by the undefined statutory terms “dirk” or “dagger”].) “General public” means “the community or people in general, usually in contrast to a specific group.”

(Oxford English Dict. Online (2019).)<sup>19</sup> Thus, the Hollister Municipal Code required the storage of hazardous materials in a way that protected the community at large—a broad category that includes first responders. The jury heard ample testimony that Keith’s actions endangered the general public through the risk of fire and exposure both to his immediate neighbors and to the police and fire officials who might respond to his house.

In sum, based on our review of the trial record, we conclude that the prosecution’s evidence was sufficient for a reasonable jury to find that Keith failed to protect the health, safety and welfare of the general public (a term that extends to neighbors, visitors, and emergency responders) through the method by which he stored dimethyl sulfate and benzyl chloride at his home. Accordingly, we reject Keith’s challenge to his conviction on count 4.

#### *B. Unanimity Instruction*

Keith argues that the jury instructions for count 2 did not require unanimity as to his reckless possession of a particular explosive (namely, whether he recklessly possessed black powder or smokeless powder). Keith claims that this error violated his federal constitutional right to a conviction proven beyond a reasonable doubt. We disagree with Keith and conclude that the jury instructions, when read as a whole, did require the jury to unanimously determine which powder he possessed recklessly.

“[T]he requirement of unanimity in criminal cases is of constitutional origin.” (*People v. Jones* (1990) 51 Cal.3d 294, 321, citing Cal. Const., art. I, § 16.) To find a defendant guilty of a particular crime, the jury must unanimously agree that the defendant committed the same specific act constituting the crime. (*People v. Crow* (1994) 28 Cal.App.4th 440, 445.) When a single crime is charged but “the evidence suggests more

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<sup>19</sup> <[www.oed.com/view/Entry/77489?redirectedFrom=general+public#eid132732878](http://www.oed.com/view/Entry/77489?redirectedFrom=general+public#eid132732878)> (as of Mar. 13, 2019), archived at: <<https://perma.cc/993Q-4AFZ>>

than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act.” (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) This rule ensures that the guilty verdict reflects a determination that all 12 jurors agreed that the defendant committed the same crime. (*People v. Quiroz* (2013) 215 Cal.App.4th 65, 73.) We review Keith’s challenge to the unanimity instruction de novo. (*People v. Hernandez* (2013) 217 Cal.App.4th 559, 568.)

“When an appellate court addresses a claim of jury misinstruction, it must assess the instructions as a whole, viewing the challenged instruction in context with other instructions, in order to determine if there was a reasonable likelihood the jury applied the challenged instruction in an impermissible manner.” (*People v. Wilson* (2008) 44 Cal.4th 758, 803; see also *Estelle v. McGuire* (1991) 502 U.S. 62, 72.) “In addition, we must assume that jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.” (*People v. Covarrubias* (2016) 1 Cal.5th 838, 915, internal quotation marks omitted.)

For count 2, the trial court instructed the jury with CALCRIM No. 2572, modified in accord with the trial evidence. The instruction stated: “To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant recklessly or maliciously possessed an explosive; . . . [¶] You may not find the defendant guilty unless *all of* you agree the People proved beyond a reasonable doubt that the defendant possessed at least one of the alleged [explosive] items [i.e., black powder or smokeless powder] and you all agree which alleged item he possessed.” (Italics added.)<sup>20</sup>

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<sup>20</sup> The reporter’s transcript indicates that the trial court did not say the italicized words when orally reading CALCRIM No. 2572 to the jury. However, the trial court said it would provide copies of the written instructions to the jurors for their deliberation, and we therefore infer that the jury received the written instructions. When a “discrepancy exists between the written and oral versions of jury instructions, the written instructions provided to the jury will control.” (*People v. Wilson* (2008) 44 Cal.4th 758, 803.)

The jury also received CALCRIM No. 3500, which reads in relevant part: “The defendant is charged with possession of explosives in a specified place in Count 2 sometime during the period of September 16, 2014. [¶] The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he committed. You do not have to be unanimous about whether the defendant acted recklessly or maliciously.”<sup>21</sup>

We reject Keith’s argument that the instructions failed to convey that the jurors had to unanimously agree on which explosive he possessed recklessly in order to convict him of the crime charged in count 2. CALCRIM No. 2572 told the jurors that the prosecution had to prove that Keith “recklessly . . . possessed an explosive,” and that they could not find Keith guilty unless they all agreed on which explosive Keith possessed. When this instruction is considered together with the unanimity instruction in CALCRIM No. 3500—which told the jury they all had to agree on the act Keith committed—the instructions adequately informed the jury that the recklessness mental state and the possession of the particular explosive had to be found concurrently and unanimously.<sup>22</sup>

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<sup>21</sup> As noted above, the prosecutor told the jury that she was only pursuing a conviction on the theory of reckless possession of an explosive. (See footnote 14, ante.) Thus, the prosecutor’s declaration rendered moot the references to malicious possession in the jury instructions.

<sup>22</sup> We reject Keith’s argument that the more specific unanimity instruction given for count 2 would have led the jury to disregard the instructions relevant to count 4. Both instructions referenced unanimity for the specific item and the related act—i.e., possession for count 2 and unsafe storage for count 4. We do not believe that the language linking unsafe storage with the specific item would have prompted jurors to disregard the interdependence of CALCRIM Nos. 3500 and 2572. (See *People v. Milosavljevic* (2010) 183 Cal.App.4th 640, 649–650.)

### *C. Vagueness*

Keith contends that Hollister Municipal Code section 8.20.630, subdivision (C) (hereafter section 8.20.630(C)), is unconstitutionally vague. Section 8.20.630(C) criminalizes the failure to store hazardous materials “in such a manner as to protect the health, safety and welfare of the general public.”<sup>23</sup> Keith argues that the ordinance “gives no hint as to what standards someone who possesses hazardous materials must meet. . . . [and] allows those charged with enforcing the law limitless discretion in deciding that a particular manner of storage of hazardous materials is unlawful.” We review Keith’s facial vagueness challenge de novo.<sup>24</sup> (*People v. Stapleton* (2017) 9 Cal.App.5th 989, 993; see also *People v. Cromer* (2001) 24 Cal.4th 889, 894.)

“A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.” (*United States v. Salerno* (1987) 481 U.S. 739, 745 (*Salerno*)). “[T]he underpinning of a vagueness challenge is the due process concept of fair warning. The rule of fair warning consists of the due process concepts of preventing arbitrary law enforcement and providing adequate notice to potential offenders, protections that are embodied in the due process clauses of the federal and California

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<sup>23</sup> Section 8.20.630(C) states in full: “All hazardous materials shall be stored in such a manner as to protect the health, safety and welfare of the general public, regardless as to the length of time such product is stored. Improper storing or handling of any hazardous materials shall be subject to the procedures set forth in Section 8.20.340 and the enforcement provisions set forth in Article VII.”

<sup>24</sup> Keith did not raise his vagueness claim in the trial court. The Attorney General acknowledges that the forfeiture doctrine generally does not apply to constitutional challenges to statutes raised for the first time on appeal if the arguments are legal, based on undisputed evidence, and center on review of general legal concepts. The Attorney General “assume[s], without conceding, that the issue [Keith raises now] is properly before this Court.” We agree with Keith that his vagueness claim is excepted from forfeiture because we can resolve the claim as a pure question of law. (*In re Sheena K.* (2007) 40 Cal.4th 875, 887–888; *People v. Hartley* (2016) 248 Cal.App.4th 620, 633.)

Constitutions. The vagueness doctrine bars enforcement of a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. A vague law not only fails to provide adequate notice to those who must observe its strictures, but also impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” (*In re Sheena K.* (2007) 40 Cal.4th 875, 890 (*Sheena K.*), citations, italics and internal quotation marks omitted.)

The “prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. Many statutes will have some inherent vagueness, for (i)n most English words and phrases there lurk uncertainties. Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid. All the Due Process Clause requires is that the law give sufficient warning that men [and women] may conduct themselves so as to avoid that which is forbidden.” (*Rose v. Locke* (1975) 423 U.S. 48, 49–50, citations and internal punctuation omitted.)

“In deciding the adequacy of any notice afforded those bound by a legal restriction, we are guided by the principles that abstract legal commands must be applied in a specific context, and that, although not admitting of mathematical certainty, the language used must have reasonable specificity.” (*Sheena K.*, *supra*, 40 Cal.4th at p. 890, internal quotation marks and italics omitted.) “A statute will not be held void for uncertainty if any reasonable and practical construction can be given its language. It will be upheld if its terms may be made reasonably certain by reference to other definable sources.” (*Personal Watercraft Coalition v. Marin County Board of Supervisors* (2002) 100 Cal.App.4th 129, 139, citation and internal quotation marks omitted.) “[D]efinable sources” include “judicial decisions and common law, legislative history, and other

portions of the legislation. Finally, and sometimes most importantly, common sense is also to be considered.” (*Ibid.*, citations omitted.)

In count 4, the complaint alleged that Keith violated Hollister Municipal Code section 8.20.040, subdivision (B), which states: “All such hazardous materials shall be contained in conformity with Sections 8.20.630 through 8.20.790 of this chapter.” Section 8.20.630(C) states in relevant part: “All hazardous materials shall be stored in such a manner as to protect the health, safety and welfare of the general public, regardless as to the length of time such product is stored.” We conclude that the language of section 8.20.630(C) is not unconstitutionally vague because it provides fair warning of proscribed conduct and sufficiently definite guidelines to law enforcement to prevent arbitrary and discriminatory prosecution.

The language of section 8.20.630(C) must be construed in light of the stated purpose of the municipal code’s chapter regulating hazardous materials. The code declares: “The purpose of this chapter is the protection of health, life, resources and property through prevention and control of unauthorized discharges of hazardous materials from storage.” (Hollister Mun. Code, § 8.20.010, subd. (A).) Read together, Hollister Municipal Code sections 8.20.630, subdivision (C), and 8.20.010, subdivision (A), reasonably put persons on notice that they must store their hazardous materials to prevent against discharges that would undermine the health, safety, and welfare of the general public. (See *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1107 (*Tobe*) [“The terms which the Court of Appeal considered vague are not so when the purpose clause of the ordinance is considered and the terms are read in that context as they should be.”].)

Further, the words of section 8.20.630(C) have reasonable specificity. The phrase “in such a manner” modifies the word “stored” and, based on common meaning, directs persons to maintain their hazardous materials in the ensuing, prescribed way. (See Oxford English Dict. Online (2019) [defining manner: “The way in which something

occurs or is performed; a method of action; a mode of procedure.”].)<sup>25</sup> The phrase “as to protect” apprises persons to act to defend or take care of “the health, safety and welfare of the general public.” (See Oxford English Dict. Online (2019) [defining protect: “To defend or guard from danger or injury; to support or assist against hostile or inimical action; to preserve from attack, persecution, harassment, etc.; to keep safe, take care of; to extend patronage to; to shield from attack or damage.”].)<sup>26</sup>

The terms in the phrase “health, safety, and welfare of the general public,” too, have reasonable and practical construction. Health is readily understood as “[s]oundness of body” (Oxford English Dict. Online (2019)),<sup>27</sup> and the term is present in other statutes that have withstood vagueness challenges. (See *People v. Harris* (1966) 239 Cal.App.2d 393, 395–397; *People v. Lockheed Shipbuilding & Constr. Co.* (1975) 50 Cal.App.3d Supp. 15, 32–33.) Similarly, courts have rejected vagueness challenges to statutes that include the term safety, concluding that the word “has a commonly understood meaning which gives adequate notice of the conduct proscribed,” and “is widely and commonly used” in statutes. (*In re Joseph G.* (1970) 7 Cal.App.3d 695, 703; see also *People v. Falck* (1997) 52 Cal.App.4th 287, 294–295; Oxford English Dict. Online (2019) [defining safety: “The state of being protected from or guarded against hurt or injury; freedom from danger.”].)<sup>28</sup> When considered along with health and safety, the term welfare provides reasonable specificity based on its common meaning—that is, the physical well-being of others. (See Oxford English Dict. Online (2019) [welfare defined:

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<sup>25</sup> <[www.oed.com/view/Entry/113569?redirectedFrom=manner#eid](http://www.oed.com/view/Entry/113569?redirectedFrom=manner#eid)> (as of Mar. 13, 2019), archived at: <<https://perma.cc/9GZN-AT7P>>

<sup>26</sup> <[www.oed.com/view/Entry/153127?redirectedFrom=protect#eid](http://www.oed.com/view/Entry/153127?redirectedFrom=protect#eid)> (as of Mar. 13, 2019), archived at: <<https://perma.cc/8GA5-4LSR>>

<sup>27</sup> <[www.oed.com/view/Entry/85020?rskey=43qp10&result=1&isAdvanced=false#eid](http://www.oed.com/view/Entry/85020?rskey=43qp10&result=1&isAdvanced=false#eid)> (as of Mar. 13, 2019), archived at: <<https://perma.cc/U6TP-BC84>>

<sup>28</sup> <[www.oed.com/view/Entry/169687?rskey=pRctIv&result=1&isAdvanced=false#eid](http://www.oed.com/view/Entry/169687?rskey=pRctIv&result=1&isAdvanced=false#eid)> (as of Mar. 13, 2019), archived at: <<https://perma.cc/M9GY-EGL3>>

“The state or condition of doing or being well; well-being, prosperity, success; the health, happiness, and fortunes of a person or group.”<sup>29</sup>; see also *Tobe*, *supra*, 9 Cal.4th at p. 1106 [explaining that the terms of a statute should be considered in context, not isolation].) As discussed above, “general public” is ordinarily and easily understood as “the community” in *Hollister* or “people in general.” (Oxford English Dict. Online (2019).)<sup>30</sup> For these reasons, we conclude that section 8.20.630(C) provides reasonable notice that persons in *Hollister* must store their hazardous materials to prevent against discharges that would harm others.<sup>31</sup>

Keith further contends that section 8.20.630(C)’s lack of a mental state requirement exacerbates its textual vagueness. He argues that precedents upholding statutes against vagueness challenges rely heavily on those laws’ requirement of culpable intent, which is not present here.

We acknowledge that it “has long [been] recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea.” (*Colautti v. Franklin* (1979) 439 U.S. 379, 395.) However, the subject matter of section 8.20.630(C) substantially mitigates the risk that the statute does not provide fair warning to individuals potentially subject to it. The United States Supreme Court has repeatedly upheld statutes that regulate dangerous materials even when they do not contain a scienter requirement on the basis that individuals dealing with

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<sup>29</sup> <[www.oed.com/view/Entry/226968?rskey=gfM5QX&result=1&isAdvanced=false#eid](http://www.oed.com/view/Entry/226968?rskey=gfM5QX&result=1&isAdvanced=false#eid)> (as of Mar. 13, 2019), archived at: <<https://perma.cc/L45X-S6CQ>>

<sup>30</sup> <[www.oed.com/view/Entry/77489?redirectedFrom=general+public#eid132732878](http://www.oed.com/view/Entry/77489?redirectedFrom=general+public#eid132732878)> (as of Mar. 13, 2019), archived at: <<https://perma.cc/2F6S-EUAU>>

<sup>31</sup> Keith notes in his argument that the jury asked questions about the *Hollister* Municipal Code during deliberations. (See footnote 17, *ante*.) He claims that the jury’s questions demonstrate the excessive vagueness of section 8.20.630(C). When evaluating a facial challenge to the constitutional validity of a statute, however, we consider the text of the statute itself, not its application to the particular circumstances of the defendant. (See *Tobe*, *supra*, 9 Cal.4th at p. 1084; *Salerno*, *supra*, 481 U.S. at p. 745.)

such substances must be aware of relevant restrictions. “In *Balint* the Court was dealing with drugs, in *Freed* with hand grenades, in this case with sulfuric and other dangerous acids. Pencils, dental floss, paper clips may also be regulated. But they may be the type of products which might raise substantial due process questions if Congress did not require . . . ‘mens rea’ as to each ingredient of the offense. But where, as here and as in *Balint* and *Freed*, dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation.” (*United States v. International Minerals & Chemical Corp.* (1971) 402 U.S. 558, 564–565; see also *People v. Hall* (2017) 2 Cal.5th 494, 501.)

Considering the language of section 8.20.630(C) in context and in light of its purpose, we conclude that the hazardous materials storage requirement provided fair warning and sufficiently definite guidelines to prevent arbitrary and discriminatory enforcement. Section 8.20.630(C) is not unconstitutionally vague on its face, and we reject Keith’s contention that we must reverse his conviction on count 4 on this ground.

#### *D. Mandatory Supervision*

Keith argues that he was entitled to have the trial court consider suspending execution of at least part of his county jail term and ordering mandatory supervision under section 1170, subdivision (h)(5). Keith claims that the trial court erred when it relied on *People v. Borynack* (2015) 238 Cal.App.4th 958 (*Borynack*)—a case Keith believes was wrongly decided—and ruled that section 18780 prohibits the granting of mandatory supervision under section 1170, subdivision (h)(5). The Attorney General counters that *Borynack* correctly concluded that section 18780 precludes the suspension of execution of a sentence (thereby foreclosing the availability of mandatory supervision under section 1170, subdivision (h)(5)), because the language of the relevant statutes is clear and unambiguous.

Because the trial court’s decision concerning the availability of mandatory supervision rested on the interpretation of a statute, we review the issue de novo. (*California Building Industry Association. v. State Water Resources Control Board* (2018) 4 Cal.5th 1032, 1041; see also *People v. Garcia* (2016) 62 Cal.4th 1116, 1122.) When interpreting statutes, our “fundamental task . . . is to determine the Legislature’s intent so as to effectuate the law’s purpose. Because the statutory language is generally the most reliable indicator of that intent, we look first at the words themselves, giving them their usual and ordinary meaning. If the statutory language is unambiguous, then its plain meaning controls. If, however, the language supports more than one reasonable construction, then we may look to extrinsic aids, including the ostensible objects to be achieved and the legislative history.” (*Ruiz, supra*, 4 Cal.5th at pp. 1105–1106, internal citations and punctuation omitted; § 4 [provisions of the Penal Code “are to be construed according to the fair import of their terms, with a view to effect [the Code’s] objects and to promote justice”].)

Section 18780 states that a “person convicted of a violation of this chapter shall not be granted probation, and the execution of the sentence imposed upon that person shall not be suspended by the court.” There is no dispute that Keith’s conviction on count 2 under section 18715 is part of the chapter subject to section 18780’s prohibition on the suspension of execution of the sentence.<sup>32</sup> Nonetheless, Keith contends that section 18780 and section 1170, subdivision (h)(5), should be construed to allow mandatory supervision. Specifically, Keith argues that “[s]ection 18780 forbids suspending execution of the *entire sentence*,” but does not preclude the suspension of “only a concluding portion of the term of imprisonment,” which occurs when a court grants mandatory supervision following a custodial term.

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<sup>32</sup> Reckless or malicious possession of an explosive is considered an inherently dangerous felony. (*People v. Morse* (1992) 2 Cal.App.4th 620, 646.)

Section 1170, subdivision (h)(5)(A) (hereafter section 1170(h)(5)(A)) states: “Unless the court finds, in the interests of justice, that it is not appropriate in a particular case, the court, when imposing a sentence pursuant to paragraph (1) or (2), shall suspend execution of a concluding portion of the term for a period selected at the court’s discretion.” Further, section 1170, subdivision (h)(5)(B) states, in pertinent part: “The portion of a defendant’s sentenced term that is suspended pursuant to this paragraph shall be known as mandatory supervision, and, unless otherwise ordered by the court, shall commence upon release from physical custody or an alternative custody program, whichever is later.”<sup>33</sup>

We agree with Keith and the Attorney General that *Borynack* incorrectly concluded that mandatory supervision “in effect, placed [the defendant] on probation.” (*Borynack, supra*, 238 Cal.App.4th at p. 965; see *People v. Fandinola* (2013) 221 Cal.App.4th 1415, 1422 (*Fandinola*) [“[T]he Legislature has decided a county jail commitment followed by mandatory supervision imposed under section 1170, subdivision (h), is akin to a state prison commitment; it is not a grant of probation or a conditional sentence.”].) Nevertheless, we conclude that section 18780 prohibits suspension of execution of a portion of a county jail term.

We concur in *Borynack*’s conclusion that “language in section 18780 is clear and without any ambiguity. Section 18780’s prohibition does not only apply to ‘traditional’ suspended sentences, i.e., suspending execution of a sentence in conjunction with a grant of probation. Rather, it precludes both a grant of probation and suspension of a sentence. In other words, any suspension of a sentence for a crime defined in the destructive

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<sup>33</sup> Section 19.9 defines mandatory supervision as follows: “For purposes of this code, ‘mandatory supervision’ shall mean the portion of a defendant’s sentenced term during which time he or she is supervised by the county probation officer pursuant to subparagraph (B) of paragraph (5) of subdivision (h) of Section 1170.”

devices and explosives chapter is prohibited, regardless of whether it is accompanied by a grant of probation.” (*Borynack, supra*, 238 Cal.App.4th at p. 964.)

The language of section 18780 is plain in its command that “the execution of the sentence imposed upon that person shall not be suspended by the court.” (§ 18780.) By suspending execution of a portion of a defendant’s term of imprisonment under section 1170(h)(5)(A), a court necessarily would suspend execution of “the sentence imposed upon that person.” (§ 18780.) Section 18780, therefore, prohibits the suspension of any portion of a sentence. Contrary to Keith’s assertion that reading the statute in this way is “overly formalistic,” the statute’s plain language dictates our reading. (See *Ruiz, supra*, 4 Cal.5th at p. 1105.)

“Sentence” refers to the penalty imposed (here, a four-year term to be served in county jail). (See 6 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012), Criminal Judgment, § 161, p. 202 [“sentence” is used to “refer to the penalty”], citing *People v. Gonzalez* (2003) 31 Cal.4th 745, 748.) And an expression of the “whole includes its parts.” (*Subsequent Injuries Fund v. Industrial Acc. Com.* (1963) 217 Cal.App.2d 322, 329.) If we were to accept Keith’s argument, we would graft an exception allowing suspension of a portion of a sentence onto section 18780’s blanket prohibition on suspending execution of any sentence. “Doing [this] would violate the cardinal rule that a statute is to be interpreted by the language in which it is written, and courts are no more at liberty to add provisions to what is therein declared in definite language than they are to disregard any of its express provisions.” (*Wells Fargo Bank v. Superior Court* (1991) 53 Cal.3d 1082, 1097, internal quotation marks omitted.)

Furthermore, our interpretation of the relevant statutes accords with and effectuates their purpose. Section 1170, subdivision (a)(3) states “[n]othing in this article shall affect any provision of law that . . . authorizes or restricts the granting of probation or suspending the execution or imposition of sentence.” By including this provision in section 1170, the Legislature expressly preserved the limitations on the

suspension of sentences set forth in other statutes. Thus, interpreting section 18780 as precluding the suspension of execution of a portion of the term of a sentence under section 1170(h)(5)(A) does not “ ‘result in absurd consequences which the Legislature did not intend.’ ” (*People v. Pieters* (1991) 52 Cal.3d 894, 898.)

Our interpretation of these sections also “construe[s] the words in question in context, keeping in mind the nature and obvious purpose of the statute[s] . . . [and] harmonize[s] the various parts of a statutory enactment by considering the particular clause or section in the context of the statutory framework as a whole.” (*People v. Murphy* (2001) 25 Cal.4th 136, 142, citations and internal quotation marks omitted.) Read together, section 18780 and section 1170, subdivisions (a)(3) and (h)(5)(A), evince the Legislature’s intent to prohibit mandatory supervision in some cases.<sup>34</sup>

We also are not persuaded by Keith’s argument that “[j]ust as section 18780 does not prohibit parole for offenders convicted of explosives offenses, it should not prohibit mandatory supervision.” Although mandatory supervision is more similar to parole than probation, the Legislature was aware that mandatory supervision is neither probation nor parole. (*Fandinola, supra*, 221 Cal.App.4th at p. 1423.) We cannot impute to the Legislature an unstated desire to grant mandatory supervision to defendants convicted under a statute that prohibits the court from suspending the execution of the sentence simply because those defendants may be eligible for parole. (See *Struckman v. Board of Trustees of Tracy Union High School* (1940) 38 Cal.App.2d 373, 376 [“We are not at liberty to impute a particular intention to the legislature when nothing in the language employed implies such an intention.”].)

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<sup>34</sup> Our conclusion is consistent with the California Rules of Court, which articulate an exclusion under section 1170, subdivision (h) “where the defendant is statutorily ineligible for suspension of any part of the sentence.” (Cal. Rules of Court, rule 4.415(a).)

For these reasons, we reject Keith's claim that the trial court erred by ruling that mandatory supervision was not available for Keith's conviction on count 2.

### **III. DISPOSITION**

The judgment is affirmed.

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DANNER, J.

WE CONCUR:

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GREENWOOD, P.J.

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GROVER, J.

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